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Cause No. PD-0478-19

In the Court of Criminal Appeals
for
The State of Texas

Ex parte Leonardo Nuncio

Arising from Cause No. 04-18-00127-CR
in the Fourth Court of Appeals in
San Antonio, Texas

Petitioner's Brief

Oscar O. Peña
SBN: 90001479
oopena14@gmail.com

Post Office Box 1324
Laredo, Texas 78042
Tel: 956.722.5167

Lead Counsel for Petitioner

Mark W. Bennett
SBN: 00792970
mb@ivi3.com

917 Franklin Street, 4th Floor
Houston, Texas 77002
Tel: 713.224.1747

Lane A. Haygood
SBN: 24066670
lane@haygoodlawfirm.com

522 North Grant Avenue
Odessa, Texas 79761
Tel: 432.337.8514
Fax: 432.225.1062

Oral Argument is Requested.

Identity of Parties and Counsel

Trial Judge:	**The Hon. Hugo Martinez** County Court at Law No. 1 1000 Houston Street Laredo, Texas 78040 Ph: 956.523.4341 Fax: 956.523.5058 **Court Reporter: Virginia Henderson**
Appellant's Trial & Appellate Counsel:	**Oscar O. Peña** SBN: 90001479 oopena14@gmail.com Attorney at Law PO Box 1324 Laredo, Texas 78042-1324 Tel: 956.722.5167 Fax: 956.722.5186
Appellee's Trial Counsel:	**Albrecht Riepen** SBN: 24093041 ariepen@webbcountytx.gov Assistant District Attorney Webb County Justice Center 1110 Victoria, Suite 401 Laredo, Texas 78040 Tel: 956.523.4900 Fax: 956.523.5054
Petitioner's Additional Appellate Counsel:	**Mark W. Bennett** SBN: 00792970 mb@ivi3.com Bennett & Bennett, Lawyers 917 Franklin Street, 4th Floor Houston, Texas 77002 Tel: 713.224.1747

Lane A. Haygood
SBN: 24066670
lane@haygoodlawfirm.com
Haygood Law Firm
522 North Grant Avenue
Odessa, Texas 79762
432.337.8514
432.225.1062

Appellee's Appellate Counsel:

David Reuthinger
SBN: 24053936
dreutheinger@webbcountytx.gov
Assistant District Attorney
Webb County Justice Center
1110 Victoria, Suite 401
Laredo, Texas 78040
Tel: 956.523.4900
Fax: 956.523.5054

Stacy M. Soule
SBN: 24031632
information@spa.texas.gov
State Prosecuting Attorney
Post Office Box 13046
Austin, Texas 78711-3046
Tel: 512.463.1660
Fax: 512.463.5724

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To the honorable judges of the Court of Criminal Appeals for the State of Texas:

Statement Regarding Oral Argument

Although this Court, in its grant of discretionary review, has denied oral argument, Appellant believes that oral argument can be of assistance to the Court in deciding this matter, as the case turns of nuanced and complicated matters of First Amendment jurisprudence.

Statement of the Case

This case arises from a pre-trial writ of habeas corpus wherein Appellant, Leonardo Nuncio, challenged the facial constitutionality of Texas Penal Code § 42.07(a)(1) and (b)(3), the Obscene Harassment statute, on grounds of vagueness and overbreadth.

Statement of Procedural History

Filing in the trial court:	Application for a Writ of Habeas Corpus under Tex. Code Crim. Proc. 11.09, challenging the constitutionality of a statute
Disposition by the trial court:	The application was denied.

Disposition by the Court of Appeals:	A panel of the Fourth Court of Appeals, consisting of justices Watkins, Alvarez, and Rodriguez, affirmed the trial court's disposition. Justice Watkins wrote for the majority, consisting of herself and Justice Alvarez (see Appendix A, the opinion below). Justice Rodriguez filed a dissent (see Appendix B, Justice Rodriguez's dissent).
Grant of discretionary review by this Court:	This Court granted discretionary review on grounds 1, 2, 3, and 4 (see Appendix C, notice of the grant of the Petition for Discretionary Review).[1]

Statement of Facts

Appellant faced charges for so-called "obscene harassment" under Tex. Pen. Code § 42.07(a)(1) and (b)(3), stemming from actions alleged to have occurred on or about June 14, 2016. The State filed a complaint and information against Appellant on May 30, 2017, to which Appellant responded with an application for a pre-trial writ of habeas corpus,

[1] The Petition for Discretionary Review presented three issues; the first issue, "Are the relevant subsections overly vague under Due Process analysis?" presented four sub-issues. This brief addresses the three major issues.

challenging the constitutionality of the Obscene Harassment statute on vagueness and overbreadth grounds.

Both the trial court and the Fourth Court of Appeals denied Appellant the relief he seeks. Justice Liza A. Rodriguez, however, wrote separately, concurring in part and dissenting in part, regarding Appellant's vagueness argument. Justice Rodriguez disagreed with the majority's holding that the state was not unconstitutionally vague; she argued that "there are too many commonplace scenarios" in which a reasonably prudent person "would not have fair notice of what conduct the statute prohibits until *after* an arrest is made." (see Appendix B, pages 2–3; emphasis in original).

SUMMARY OF THE ARGUMENT

1. POINT OF ERROR NO. 1

The Obscene Harassment statute is void for vagueness because it does not meet state and federal definiteness and certainty requirements. The statute fails to provide persons a reasonable opportunity to know whether their conduct is prohibited. The statute itself is so vague as to encourage arbitrary and capricious prosecution in violation of citizens' First Amendment rights. Further, the statute gives an inordinate amount of power to the complaining witness, resulting in an

unconstitutional delegation of prosecutorial power to the complaining witness, without providing adequate narrowing or limiting factors to protect citizens accused.

2. Point of Error No. 2

Section 42.07(a)(1) is unconstitutionally overbroad because it infringes upon the right of free expression, and the definition of obscenity set out in section 42.07(b)(3) is not constitutionally sound.

3. Point of Error No. 3

In the modern era, the *Miller* test, relying as it does on "contemporary community standards," is unworkable. The relevant definition of "community" has increased with the now-global reach of the Internet and the pervasiveness of net-connected services in our lives, including social media.

Argument

The statute at issue reads:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
> (1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene....[2]

[2] Tex. Pen. Code § 42.07(a)(1).

The statute further defines "obscene" as follows:

> (b) In this section:
> (3) "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.[3]

Arguing below, Appellant claimed that the statute's use of the term "another" rendered it such that a person of ordinary intelligence could not determine the identity of the "victim" of the statute, leaving law enforcement authorities with "unfettered discretion to decide under what circumstances to enforce the provision" (see Appendix A, opinion below, at page 9).

1. THE OBSCENE HARASSMENT STATUTE IS UNCONSTITUTIONALLY VAGUE.

A statute may be challenged on the grounds that it is unconstitutionally vague on its face. A statute fails the constitutional test for vagueness when it fails to define the criminal offense with sufficient definiteness that ordinary persons can understand what conduct is prohibited.[4]. A

[3] Tex. Pen. Code § 42.07(b)(3).

[4] *Martinez v. State*, 323 S.W.3d 493, 507 (Tex. Crim. App. 2010).

statute must further define the prohibited conduct in such a manner that does not permit arbitrary and discriminatory enforcement. [5]

In First Amendment jurisprudence, "[t]he very existence of ... [a] censorial power, regardless of how or whether it is exercised, is unacceptable."[6] When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness "demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

The Texas harassment statute itself has been frequently attacked and sometimes held to be unconstitutional in its various subparts.[7] In *Kramer*, the Fifth Circuit noted that "Texas courts have refused to construe the statute to indicate **whose sensibilities** must be offended."[8] Without the aid of "judicial clarification," the federal court reasoned,

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[5] *Id., citing Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007).

[6] *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 822-23 (5th Cir. 1979).

[7] *See, e.g., Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983) (holding a prior version of section 42.07(a)(1) unconstitutional because "annoy" and "alarm" were vague).

[8] *Id.* (emphasis added), *citing Kramer v. State*, 605 S.W.2d 861 (Tex. Crim. App. 1980); *Collection Consultants, Inc. v. State*, 556 S.W.2d 787 (Tex. Crim. App. 1977).

"enforcement officials, as well as the citizens of Texas, are unable to determine what conduct is prohibited by the statute."[9]

This Court adopted the Fifth Circuit's reasoning from *Kramer* with regard to the pre-1983 version of the harassment statute in *May v. State*.[10]

In *Long v. State* this Court discussed the import of *Kramer v. Price* on its own vagueness jurisprudence, and held that a prior version of the Texas stalking statute, section 42.072(a) of the Texas Penal Code, was unconstitutionally vague because the statute did "little or nothing to inform an ordinary person that his conduct is forbidden" by the statute.[11] The Court discussed, at length, limiting factors that would render the stalking statute more definite and thus constitutional, but declined to read them into the statute, leaving it to the Legislature to choose a cure for the defect. [12]

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[9] *Kramer v. Price*, 712 F.2d at 178.

[10] *May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989)

[11] *Long v. State*, 931 S.W.2d 285, 290 (Tex. Crim. App. 1996).

[12] *Id.* at 296-97.

1.1. Ordinary persons cannot determine by reading the Obscene Harassment statute whether their conduct is proscribed or permitted.

A law must give an ordinary person notice of what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). All criminal laws must give fair notice of what activity is made criminal.[13] When First Amendment rights are implicated, the statute must additionally avoid chilling protected expression.[14]

The Fourth Court of Appeals argued that no provision of either section 42.07(a)(1) or (b)(3) "infringe[d] upon any constitutionally protected speech or conduct" (Appendix A, page 10). This is the court below's first significant error.

1.2. The court below incorrectly identified the scope of constitutionally-protected speech and conduct.

In discussing Appellant's overbreadth challenge, the Fourth Court of Appeals misidentified the scope of constitutionally-protected expression. The court of appeals stated correctly that the First Amendment is not without exception (Appendix A, page 5). Citing to

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[13] *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989).

[14] *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018).

United States v. Stevens,[15] the court below noted that "obscenity" is one of the traditional categories of unprotected speech. Because section 42.07(b)(3) specifically defines "obscene," the court reasoned, it is not ambiguous; and because the definition given is more narrow than the traditional definition afforded by the United States Supreme Court in *Miller v. California*,[16] the statute at issue cannot proscribe protected expression.

There is a fatal flaw in the Fourth Court of Appeals' syllogism, however. If we take their argument form to be thus:

Premise	Well-formed formula	Authority
P1.	Obscene speech is not given constitutional protection.	*Miller*
P2.	Section 42.07(a)(1) criminalizes only obscene speech.	The opinion below.
C1.	Therefore, sec. 42.07(a)(1) does not reach protected speech.	*Modus ponens* on P1 & P2

The error lies in Premise 2, which contends that section 42.07(b)(3) adequately defines "obscene speech." Section 42.07(a)(1) does not

[15] *United States v. Stevens*, 559 U.S. 460 (2010).

[16] Miller v. California, 413 U.S. 15, 23 (1973).

criminalize only unprotected obscene speech because section 42.07(b)(3)'s definition of obscene is not limited to constitutionally unprotected obscenity.

That section's definition of "obscene"—"containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function" omits *almost all* of *Miller*'s required elements. It is not required, for a prosecution under the statute, that:

1. The speech, taken as a whole, *appeal to the prurient interest*;[17]
2. The sexual conduct described be specifically defined by the applicable state law;[18]
3. The speech, *taken as a whole*, contain a patently offensive description or a solicitation to commit an ultimate sex act; and
4. The speech, taken as a whole, lack serious literary, artistic, political, or social value.

Speech may contain a patently offensive description or solicitation to commit some ultimate sex act while not, taken as a whole, appealing to

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[17] "Prurient" is not synonymous with "sexual"; "sleazy" is a closer equivalent. *Prurient*, American Heritage Dictionary (4th Ed. 2006)

[18] Section 42.07(b)(3)'s definition of obscenity includes only a non-exclusive list of ultimate sex acts.

the prurient interest. Such speech would not be obscene, as *Miller v. California* describes it, but would, despite—indeed, based on—its protected content, be restrictable under the statute.

Likewise, speech may contain a patently offensive description or solicitation to commit some ultimate sex act while not, taken as a whole, portraying sexual conduct in a patently offensive manner. Such speech would not be obscene, as *Miller v. California* describes it, but would, based on its content, be restrictable under the statute.

Further, speech might, taken as a whole, portray sexual conduct in a patently offensive manner, and still have serious literary, artistic, political, or scientific value. Such speech would not be unprotected obscenity, but it would be restrictable based on its content under the statute.

Because section 42.07(b)(3)'s definition of "obscene" does not include *any* of the elements of the definition of unprotected obscenity, it restricts non-obscene speech.

> From 1791 to the present ... the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations.[19]

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[19] *U.S. v. Stevens*, 559 U.S. at 468 (internal edits omitted).

Because speech that is not within recognized categories (the "few limited areas" referred to in that quotation) of historically unprotected speech is, *ipso facto*, protected, and because the speech restricted by section 42.07(a)(1) falls into no such category, section 42.07(a)(1) reaches protected speech.

1.3. THE MILLER TEST IS NOT A TEST FOR OBSCENITY IN SPEECH, BUT A TEST FOR THE VALIDITY OF OBSCENITY STATUTES.

In *Miller v. California*, the United States Supreme Court faced a case of a defendant engaged in a mass mailing campaign to advertise adult illustrated books.[20] The *Miller* Court, noting the high Court's own fraught history with attempting to define obscenity, stated at the outset that the only sure principle to which all justices would assent is that obscenity enjoys no constitutional protection.[21] The Court further held that any attempt by individual states to limit obscene expression must be carefully limited.[22]

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[20] *Miller*, 413 U.S. at 16-17.

[21] *Miller*, 413 U.S. at 23, *citing Kois v. Wisconsin*, 408 U.S. 229 (1972).

[22] *Miller*, 413 U.S. at 24, *citing Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 682 (1968).

In attempting to define the permissible scope of such regulation, the *Miller* Court issued its now-famous trio of factors. Conventional legal wisdom calls this the "*Miller* test" for obscenity in speech.

The *Miller* Court, however, was clear in prefacing this statement of the law:

> **The basic guidelines for the trier of fact** must be: (a) whether "the average person, applying contemporary community standards" would find the work, taken as a whole, appeals to prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[23]

Thus the *Miller* test, as set down by the Supreme Court in *Miller*, is not a test for *obscenity*, but a test for *the validity of an obscenity statute*. If the statute includes these guidelines for the trier of fact, it passes *Miller* muster. If the statute omits any of these guidelines, even if it restricts only speech that all legislators, prosecutors, judges, and other right-thinking people agree satisfies all three of *Miller*'s substantive factors, it is invalid.

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[23] *Id.* (emphasis added, internal citations omitted).

The statute here omits every one of *Miller*'s requirements for an obscenity statute. It thus fails as an obscenity statute under the *Miller* test.

1.4. "Ultimate sex act" is vague.

Recall the definition of obscenity given in the statute:

> (3) "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

Tex. Pen. Code § 42.07(b)(3). Because this definition does not incorporate the elements required by *Miller*, this Court should be loath to grant its approval to the language used.

In point of fact, this Court has sometimes struggled with the definitions used in section 42.07(b)(3).[24] Section 42.07(b)(3), while it contains a list of six topics that will by definition be obscene, does not limit itself to those six topics.

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[24] *See, e.g., Pettijohn v. State*, 782 S.W.2d 866, 868-69 (Tex. Crim. App. 1989) ("ultimate sex act" must mean more than a general allegation of sexual activity); *Lefevers v. State*, 20 S.W.3d 707, 712 (Tex. Crim. App. 2012) ("I want to feel your breasts" is not encompassed by the phrase "ultimate sex act," which of necessity must include "sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus").

It is a specific requirement of the *Miller* test for the constitutionality of obscenity statutes that the statute include, as an element, that the work depict or describe "sexual conduct specifically defined by the applicable state law."[25]

Section 42.07(b)(3)'s non-exclusive list of "ultimate sexual conduct" does not purport to be complete; it does not specifically define the sexual conduct as required by Miller.

1.5. "Patently offensive" is vague.

Nor does section 42.07(b)(3) state what "patently offensive" means. This Court, in construing the term, has held that "patently offensive" is "a subjective element not visible to the naked eye."[26] This element requires a determination by a factfinder that the depiction is "patently offensive." *A fortiori*, it would be impossible then to determine prior to court proceedings whether something is patently offensive, and the definition itself is void for vagueness.

Because the definition of obscenity given in the statute is itself vague, the Fourth Court of Appeals wrongly construed section 42.07(a)(1) to

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[25] *Miller v. California*, 413 U.S. at 25.

[26] *Andrews v. State*, 652 S.W.2d 370, 374 (Tex. Crim. App. 1983).

restrict only unprotected expression. For that reason, the decision below is incorrect and requires correction by this Court.

1.6. The Obscene Harassment statute does not provide guidance to the citizen accused as to whether her conduct is prohibited.

Because the definition of obscenity is itself vague, and the statute at issue has at least the potential to infringe upon protected speech, the Obscene Harassment statute fails to provide citizens accused a reasonable opportunity to know that their conduct is prohibited. [27]

By failing to include, as guidelines for the finder of fact, all of the elements required by *Miller v. California*, the statute fails to give the public notice of what conduct is forbidden under the statute.

1.7. The statute is vague as regards the target of the actor's intent or recipient of the communication.

The Obscene Harassment statute lacks an explicit nexus between the intent of the accused and the person who hears or reads the communication. By its plain text, section 42.07(a)(1) does not require that the complaining witness be the intended recipient of the communication. If Al and Bob are engaged in a spirited contest of wits,

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[27] *See Long*, 931 S.W.2d at 288.

and Al begins to cast aspersions upon the chastity and good nature of Bob's mother, then presumably Clara, who is listening in the foyer, could bring charges against Al if she finds that Al's words amounted to a "comment, request, suggestion, or proposal that is obscene," where "obscene" means anything patently offensive that describes an ultimate sex act.

If Al had understood Clara to be within earshot, he would not have said such crude things, because, due to his long professional association with Clara, he understands that what Clara finds patently offensive is a larger set than the things Bob finds patently offensive. Al intended to annoy Bob in good fun, but did not intend that Clara overhear the conversation; must Al, before speaking, determine who is within hearing range?

In fact, because Al could be prosecuted for speech to Bob that is patently offensive to the eavesdropping Clara, must Al take a poll of the likely jurors in an obscenity case to determine whether his conduct runs afoul of the "subjective" definition of patently offensive that will be applied at his forthcoming obscenity trial? The opinion below would have us believe this is to be the case, since, by its very nature, in the eyes

of the majority, section 42.07(a)(1) cannot possibly reach any expression other than obscene expression.

1.8. The statute is vague with regard to the use of the word "another."

In a second context, the statute at issue uses the word "another" in a vague sense. The statute does not limit in any meaningful way the universe of potential victims. Say in this instance our dear sweet and genteel Clara was not the one lurking in the foyer, but Al's and Bob's other colleague Darrell. Darrell is even more strait-laced than Clara, but male. Because section 42.07(a)(1) does not require that the recipient of the speech find it patently offensive, Darrell could potentially take the case to the prosecutor on Clara's behalf, stating that if Clara were to be around to hear Al's foul-mouthed tirade, she would—patently—have been offended on behalf of the fairer sex.

Insofar as the plainly legitimate sweep of the statue is to prohibit people from sending harassing messages containing obscene content, then, the statute fails for vagueness because it does not adequately define who must be harassed, nor whether that potential harassee must hear the communication at issue.

For these reasons, the statute at issue does not provide reasonable, due process notice to citizens accused whether their conduct is prohibited or permitted. The statute at issue fails the initial test for vagueness and must be declared void *ab initio*.

1.9. The Obscene Harassment statute is susceptible to arbitrary enforcement.

A statute must further not be susceptible to arbitrary and discriminatory enforcement, or else it is unconstitutionally vague.[28] A statute fails this criterion for vagueness if it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc or subjective basis."[29] A statute will be void for vagueness if it encourages arbitrary and erratic arrests and convictions.[30]

1.10. The statute at issue delegates the discretion to consider context to witnesses and the prosecution.

Section 42.07(a)(1), which does not incorporate *Miller v. California*'s requirement that the fact finder judge the appeal and value of a work

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[28] *Lawrence v. State*, 240 S.W.3d at 915.

[29] *Grayned v. City of Rockford*, 408 U.S. at 108-09.

[30] *McMorris v. State*, 516 S.W.2d 927 (Tex. Crim. App. 1974).

"taken as a whole," delegates the problem of *context* to witnesses (including, perhaps, the complaining witness) and the prosecution. By omitting *Miller*'s "taken as a whole" proviso, the statute leaves the framing of the context up to the recipient or witnesses, and then directs law enforcement to **ignore** any actual context and to accept the contextualization provided by the person offended by the speech.

Consider our earlier example of Al and Bob. While we have established that Al's wit is most cutting and Bob has been, in the parlance of the streets, "burned," we do not know if Bob was indeed offended. Perhaps this is a common game between the two men; after all, such pursuits have not been unknown to ladies and gentlemen of society going back to antiquity. *See Flyting, Sounding, Debate: Three Verbal Contest Genres*, by Parks, Ward. Poetics Today, vol. 7, o. 3. Duke University Press (1986). The practice of "flyting," in particular, required two poets, in verse, to exchange insults. *See Flyting in Shakespeare's Comedies*, by Galway, Margaret. The Shakespeare Association Bulletin, vol. 10, no. 4. Oxford University Press (1935).

Were Al and Bob engaged in The Dozens, a modern reconstruction of "flyting," either Clara's or Darrell's eavesdropped offendedness is without the essential context in which the speech was made. Thus the

prosecutor might institute criminal charges against Al without knowing that Al was in fact engaged in a time-honored poetic tradition of "roasting" Bob, not, as Clara surmised, merely insulting him, nor, as Darrell believed, engaging in hate speech meant to offend women.

1.11. Because the statute directs law enforcement to ignore context, it is an impermissible delegation of a subjective determination.

If the second test for vagueness is whether the language of the statute permits arbitrary and discriminatory enforcement, then any statute which provides too broad discretion to law enforcement must fail this test.[31]

As shown throughout this discussion, the *Miller*-noncompliant definition of obscenity in the statute, coupled with the lack of specificity for who must make the complaint and the problem of context, renders section 42.07(a)(1) uniquely susceptible of arbitrary and discriminatory enforcement. So many subjective determinations must be made, first by the recipient, then by any witnesses, then by law enforcement, then by the prosecutor, then by a judge, and ultimately by a factfinder, that it would be impossible for a rational actor, standing in the shoes of a

[31] *State v. Fry*, 867 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1993, no pet.).

defendant, to determine whether his utterances were or were not "obscene" and therefore impermissible.

2. THE STATUTE AT ISSUE IS OVERBROAD.

A restriction is overbroad, under the First Amendment, when it restricts a real and substantial amount of protected speech in relation to its plainly legitimate sweep.

Section 42.07(a)(1) is a content-based restriction on speech. Because it is a content-based restriction on speech, section 42.07(a)(1) is presumptively invalid under the First Amendment. The State has the burden of showing that the statute meets strict scrutiny. That is, the State must show that the statute is both necessary and narrowly written to satisfy a compelling government interest. The State cannot do so.

2.1. STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW.

Government may not regulate speech "because of its message, its ideas, its subject matter, or its content."[32]

[32] *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972).

The modern approach to First Amendment facial challenges to statutes is illustrated in Figure 1.[33]

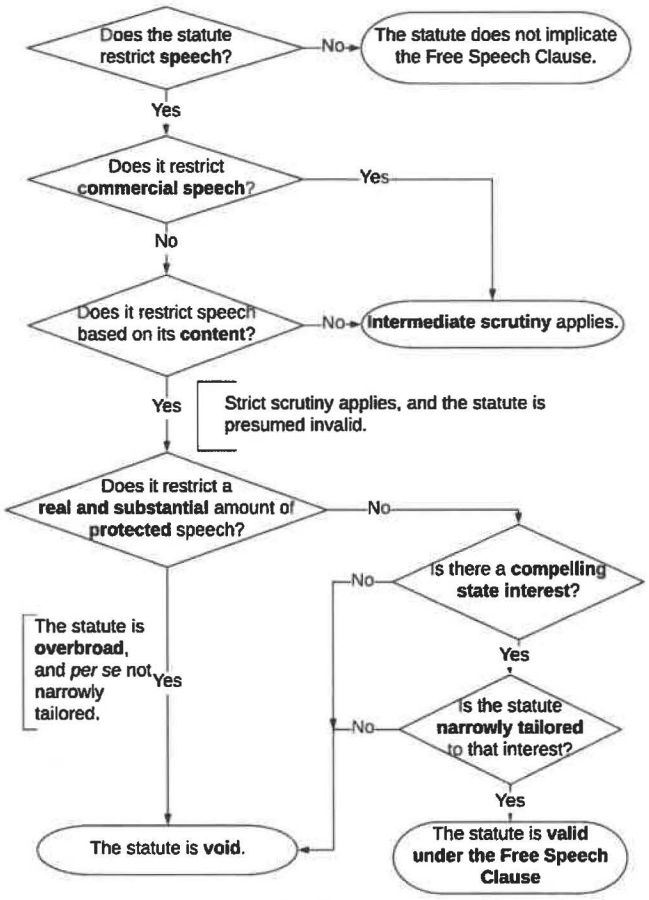

Figure 1

[33] *See U.S. v. Alvarez*, 567 U.S. 709 (2012) (applying this approach to the Stolen Valor Act); *United States v. Stevens*, 559 U.S. 460 (applying this approach to law forbidding animal-cruelty videos); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. ___, 135 S. Ct. 2218 (2015) (defining content-based restrictions).

Here, strict scrutiny with a presumption of invalidity (and a burden, concomitant with this presumption, on the State[34]) is the appropriate standard of review.

"Content-based regulations are presumptively invalid, and it is rare that a regulation restricting speech because of its content will ever be permissible."[35] "[W]hen a statute is content based, it may be upheld only if it is the least restrictive means of achieving the compelling government interest in question."[36]

2.2. THE STATUTE RESTRICTS SPEECH BASED ON ITS CONTENT.

Section 42.07(a)(1)'s restriction on speech is content-based because it favors some speech over other speech based on its purpose (to harass, annoy, alarm, abuse, torment, or embarrass).[37]

Moreover, under section 42.07(a)(1) a communication must be a "comment, request, suggestion, or proposal"; this describes the content of the speech.

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[34] *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

[35] *Ex parte Thompson*, 442 S.W.3d 325, 348 (Tex. Crim. App. 2014).

[36] *Id.*

[37] *Reed v. Town of Gilbert, Ariz.*, 476 U.S. ___, 135 S.Ct. 2218, 2227 (2015).

Further, under section 42.07(a)(1) the comment, request, suggestion, or proposal must be "obscene." This, too, describes the content of the speech.[38]

The statute's restriction is content based also because liability depends on the "thought underlying" the communication (intent to harass, annoy, alarm, abuse, torment, or embarrass).[39]

Because section 42.07(a)(1) regulates speech based on its content, it is presumed invalid, and the court must determine if it regulates an area of unprotected speech.

2.3. THE STATUTE IS PRESUMED TO BE UNCONSTITUTIONAL.

"Content-based regulations are presumptively invalid, and it is rare that a regulation restricting speech because of its content will ever be permissible."[40]

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[38] *Obscene* under the statute, however is not obscene under Supreme Court authority.

[39] *See Ex parte Thompson*, 442 S.W.3d at 347 (holding a portion of section 21.15 of the Texas Penal Code content-based because it discriminated on the basis of the underlying sexual thought).

[40] *Ex parte Thompson*, 442 S.W.3d at 348.

2.4. THE STATUTE RESTRICTS PROTECTED SPEECH.

If section 42.07(a)(1) restricted only unprotected speech, it would be a valid restriction. But the Supreme Court has recognized only nine categories of speech unprotected by the First Amendment:

- Advocacy intended, and likely, to incite imminent lawless action;
- Obscenity;
- Defamation;
- Speech integral to criminal conduct;
- So-called "fighting words";
- Child pornography;
- Fraud;
- True threats; and
- Speech presenting some grave and imminent threat the government has the power to prevent, "although," says the Supreme Court, "a restriction under the last category is most difficult to sustain."

All speech falling outside of these categories is protected.

The statute purports to restrict "obscenity," but the statute does not limit the sweep of "obscenity" as required by *Miller v. California*.[41]

Speech does not become unprotected merely because it is intended to harass, alarm, abuse or embarrass.

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[41] *Miller v. California*, 413 U.S. at 24.

2.5. The statute's overbreadth is real and substantial.

Because section 42.07(a)(1) is a content-based restriction on speech, it is subject to strict scrutiny, and is presumptively invalid. The State has the burden of overcoming this presumption by showing that the overbreadth is not substantial, and cannot do so.

2.6. The Supreme Court has decided this issue.

In *Miller v. California* the Court set down rules with which a state obscenity offense must comply:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

As discussed above at 18, section 42.07(a)(1) and (b)(3) fail to provide to the trier of fact *Miller*'s "basic guidelines."

2.7. The State cannot prove the statute to be constitutional.

"[W]hen a statute is content based, it may be upheld only if it is the least restrictive means of achieving the compelling government interest in question."[42]

2.8. Section 42.07(a)(1) cannot survive strict scrutiny.

Texas's Obscene Harassment statute swings at obscenity, and misses. Because the statute does not satisfy *Miller v. California*'s baseline requirements for an obscenity statute, it restricts a real and substantial amount of protected (i.e. non-obscene) speech in relation to its plainly legitimate sweep (i.e. obscenity), and is therefore void for overbreadth.[43]

3. The *Miller* test holds no relevance in the modern world.

When *Miller v. California* was decided, there was no Internet. Communication with people outside of the immediate geographic area was the province almost exclusively of mass media and corporations doing business. An individual in Portland, Oregon (for example)

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[42] *Ex parte Thompson*, 442 S.W.3d at 348.

[43] *United States v. Stevens*, 559 U.S. at 473.

communicating with people in Tyler, Texas would be doing so deliberately, by making a telephone call or sending mail. At the time it made sense for the appeal, the offensiveness, and the value of sexual speech to be judged by a jury in the community where the speech was received, based on the standards of that community.

Now, however, the Internet is "the modern public square."[44] That person in Portland can, using Facebook or Twitter or Tumblr or Gab or Instagram or whatever, publish to a Tyler audience, without specifically intending to, speech that to a Portland jury would be clearly non-obscene but that fails Tyler standards for prurient appeal, patent offensiveness, and lack of serious value.

This, too, is a question of vagueness. Even if section 42.07(a)(1) satisfied *Miller*'s tripartite test for obscenity statute, it would fail because that test is itself vague in a world of modern communication. A speaker will never be able to tell, in the internet age, whether his public speech is going to wind up in a place where people will interpret it differently than he intends.

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[44] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

Even as far back as 1987, the Supreme Court realized the difficulty of the "contemporary community standards" language of *Miller*, when it held in *Pope v. Illinois*[45] that the "contemporary community standards" language should not guide a juror, but rather a "reasonable person" standard.[46] Nowhere in section 42.07(a)(1) or (b)(3) does the Texas Legislature attempt to limit the effect of the statutes to expressive conduct that a "reasonable person" would find obscene. For the Court below to have held that it may not overturn *Miller*'s definition of obscenity is therefore in error; *Miller*'s definition has been eroded by the passage of time and the piecemeal jurisprudence of the Supreme Court. This Court should allow it a graceful, respectable ending, and hold that the definition of obscenity given in *Miller*, which is, as demonstrated *supra*, a test for the statute rather than the speech at issue, wholly fails to apprise legislators of their task, let alone those who must Interpret and comply with the law.

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[45] *Pope v. Illinois*, 481 U.S. 497 (1987).

[46] *Id.* at 500-01.

Thus, even if it complied with *Miller v. California*, section 42.07(a)(1) would fail to give an ordinary person notice of what is prohibited.[47] It would delegate to police and prosecutors—possibly in communities far from the speaker's intended audience—the question of what speech is prosecutable.[48] It would fail to give fair notice of what activity is made criminal.[49] It would it encourage arbitrary and erratic arrests and convictions, even in jurisdictions far from where the speech was uttered.[50] And it would inevitably chill protected expression. [51]

Conclusion and Prayer

For all of these reasons, the statutes at issue, Texas Penal Code § 42.07(a)(1) and (b)(3), read together, are unconstitutionally vague, overbroad, and infringe upon the right of all Americans to free expression. They must be therefore struck down as void *ab initio*, and

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[47] *See Grayned v. City of Rockford*, 408 U.S. at 108.

[48] *See id.*

[49] *See Bynum v. State*, 767 S.W.2d at 773.

[50] *See McMorris v. State*, 516 S.W.2d 927.

[51] *See Wagner v. State*, 539 S.W.3d at 314.

the trial court must be instructed to dismiss the complaint and information against Appellant.

Respectfully submitted,

OSCAR O. PEÑA
1720 Matamoros St.
Laredo, Texas 78040
Telephone: 956.722.5167
Facsimile: 956.722.5186
oscar@oscarpenalaw.com
Texas Bar Number 90001479

LANE A. HAYGOOD
522 N. Grant Ave.
Odessa, Texas 79761
Telephone: 432.337.8514
lane@haygoodlawfirm.com
Texas Bar Number 24066670

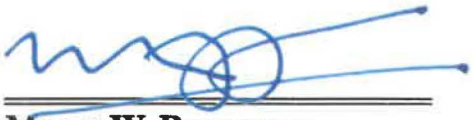
Bennett & Bennett, Lawyers
By:

MARK BENNETT
917 Franklin Street, Fourth Floor
Houston, Texas 77002
Telephone: (713) 224-1747
mb@ivi3.com
Texas Bar Number 00792970

Counsel for Appellant /
Defendant Leonardo Nuncio

Certificate of Service

I hereby certify that a true and correct copy of the foregoing brief was served on all parties and counsel of record as required by the Texas Rules of Appellate Procedure on the same date as the original was electronically filed with the Clerk of this Court.



Mark W. Bennett
Attorney for Appellant

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Mark W. Bennett
Attorney for Appellant

APPENDIX

TAB A

Opinion Below

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-18-00127-CR

EX PARTE Leonardo **NUNCIO**

From the County Court at Law No. 1, Webb County, Texas
Trial Court No. 2017 CVJ 002365-C1
Honorable Hugo Martinez, Judge Presiding

Opinion by: Beth Watkins, Justice
Dissenting Opinion by: Liza A. Rodriguez, Justice

Sitting: Patricia O. Alvarez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: April 10, 2019

AFFIRMED

Authorities charged appellant Leonardo Nuncio with violating section 42.07(a)(1) of the Texas Penal Code, i.e., the harassment statute. Nuncio filed a pretrial application for writ of habeas corpus in which he contended sections 42.07(a)(1) and (b)(3) of the harassment statute were unconstitutionally overbroad and vague. The trial court denied his application. On appeal, Nuncio contends the trial court erred in denying his application.[1] We affirm the trial court's order denying Nuncio's application for writ of habeas corpus.

[1] In his application, Nuncio challenged the statutory provisions as both facially unconstitutional and unconstitutional as applied. On appeal, however, Nuncio argues only the facial unconstitutionality of the provisions.

BACKGROUND

According to the complaint prepared by an investigator from the Laredo Police Department ("LPD"), he met with the complainant at her residence. The complainant told the investigator she met with Nuncio for a job interview. The complainant stated that during the two-hour interview Nuncio stared at her breasts and "made several rude comments." Nuncio allegedly asked the complainant if she liked to "party" and asked "what have you and your boyfriend done (sexually)." He also asked if her breasts were "Ds or double Ds" and told the complainant she was "hot." Nuncio went on to ask the complainant to text her boyfriend "so you all can do a quickie in the back (of [the restaurant])." Nuncio also told the complainant she "can't be a virgin" and work for him.

When the LPD investigator asked to meet with Nuncio, Nuncio refused and stated his intent to sue the complainant's mother for comments she allegedly made on social media about her daughter's encounter with Nuncio. The District Attorney's Office subsequently approved an arrest warrant for Nuncio, and a sworn complaint alleged Nuncio, "with intent to harass, annoy, alarm, abuse, torment, or embarrass [the complainant], ... initiate [sic] communication with the complainant, and in the course of the communication, make [sic] an obscene comment, to-wit: making comments about her breasts, asking about her sexual history, and/or telling [her] she could not be a virgin and work for him."

In response to the charge, Nuncio filed an application for writ of habeas corpus, challenging the constitutionality of the harassment statute under which he was charged. After the trial court denied his application, Nuncio timely perfected this appeal.

ANALYSIS

In his first two appellate issues, Nuncio challenges the facial constitutionality of sections 42.07(a)(1) and (b)(3) of the Texas Penal Code, arguing the provisions are overbroad and vague.

Section 42.07(a) provides that a person commits the offense of harassment if "with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person … initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene[.]" TEX. PENAL CODE ANN. § 42.07(a)(1). "Obscene" is specifically defined as "a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function." *Id.* § 42.07(b)(3). Nuncio argues the challenged provisions are overbroad because they invade the area of protected speech and are vague in that they deprive a person of adequate notice of the prohibited activity and give law enforcement authorities too much discretion with regard to enforcement. As for his third issue, Nuncio suggests this court should overturn the Supreme Court's opinion in *Miller v. California*, arguing its definition of obscenity is outdated.

Standard of Review

A defendant may file a pretrial application for writ of habeas corpus to raise a facial challenge to the constitutionality of the statute under which the defendant is charged. *Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014); *Ex parte Zavala*, 421 S.W.3d 227, 231 (Tex. App.—San Antonio 2103, pet. ref'd). An appellate court generally reviews a trial court's decision to grant or deny an application for writ of habeas corpus under an abuse of discretion standard. *Ex parte Thompson*, 414 S.W.3d 872, 876 (Tex. App.—San Antonio 2013), *aff'd*, 442 S.W.3d at 330. However, when the trial court's ruling is based purely on an application of law, such as the constitutionality of a statute, we review the ruling de novo. *Id.*; *see Ex Parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013), *abrogated in part on other grounds*, TEX. CONST. art. V, § 32; *Lebo v. State*, 474 S.W.3d 405 (Tex. App.—San Antonio 2015, pet. ref'd).

When presented with a challenge to the constitutionality of a statute, an appellate court usually presumes the statute is valid and the Legislature has not acted arbitrarily or unreasonably.

Lo, 424 S.W.3d at 14–15. With respect to constitutional provisions other than the First Amendment, a facial challenge to the constitutionality of a statute succeeds only if it is shown the statute is unconstitutional in all of its applications. *State v. Johnson*, 475 S.W.3d 860, 864 (Tex. Crim. App. 2015). However, if the statute in question restricts and punishes speech based on its content, the usual presumption of constitutionality does not apply. *Lo*, 424 S.W.3d at 15. Content-based restrictions are presumptively invalid, and the State has the burden to rebut the presumption. *Id.* A court uses strict scrutiny in its review of a content-based statute. *Thompson*, 442 S.W.3d at 344–45; *Lo*, 424 S.W.3d at 15–16.

Overbreadth

Nuncio contends sections 42.07(a)(1) and (b)(3) are unconstitutionally overbroad, violating the First and Fourteenth Amendments of the United States Constitution and Article I, section eight of the Texas Constitution.[2] *See* U.S. CONST. amends. I, XIV; TEX. CONST. art. I, § 8. When, as here, a party challenges a statute as both overbroad and vague, we must first consider the overbreadth challenged. *See Ex parte Maddison*, 518 S.W.3d 630, 636 (Tex. App.—Waco 2017, pet. ref'd) (citing *Ex parte Flores*, 483 S.W.3d 632, 643 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)).

A statute may be challenged as overbroad, in violation of the First Amendment — and Article I, section 10 — if, in addition to proscribing activity that may be constitutionally forbidden,

[2] Nuncio also contends the challenged provisions violate Article I, section 10 of the Texas Constitution. This provision concerns the rights of defendants in criminal prosecutions. It provides that in all criminal prosecutions, the accused has the right to: (1) a speedy public trial by an impartial jury; (2) demand the nature and cause of the accusation against him; (3) refuse to incriminate himself; (4) be heard by himself, counsel, or both; (5) confront the witnesses against him; (6) produce and have evidence admitted; and (7) indictment by a grand jury except under certain circumstances. TEX. CONST. art. I, §10. Nuncio provides no argument or authority challenging sections 42.07(a)(1) and (b)(3) with regard to these constitutional protections. Rather, his argument is limited to a challenge that the statutory provisions are overbroad under the First Amendment of the United States Constitution and article I, section 8 of the Texas Constitution. *See* U.S. CONST. amend. I; TEX. CONST. art. I, § 8. Accordingly, we do not consider his overbreadth argument as a challenge under article I, section 10 of the Texas Constitution.

it sweeps within its coverage a substantial amount of expressive activity that is protected by the First Amendment. *See Scott v. State*, 322 S.W.3d 662, 665 n.2 (Tex. Crim. App. 2010), *abrogated in part on other grounds*, *Wilson v. State*, 448 S.W.3d 418, 423 (Tex. Crim. App. 2014). However, the overbreadth doctrine "is strong medicine that is used sparingly and only as a last resort." *Johnson*, 475 S.W.3d at 865. To qualify as unconstitutionally overbroad, "the statute must prohibit a substantial amount of *protected* expression and the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'" *Id.* (emphasis added) (quoting *United States v. Stevens*, 559 U.S. 460, 485 (2010) (Alito, J., dissenting)). Laws restricting the exercise of rights under the First Amendment are facially overbroad only if the impermissible applications of the law are real and substantial when judged in relation to the statute's legitimate sweep. *Maddison*, 518 S.W.3d at 636. We must uphold a challenged statute if we can ascertain a reasonable construction that renders it constitutional. *Id.*; *Flores*, 483 S.W.3d at 643.

The State argues the provisions challenged by Nuncio are not unconstitutionally overbroad because under a reasonable construction, they do not prohibit expression protected by the First Amendment. More specifically, the State contends the statute does not implicate the First Amendment because it proscribes the use of obscenity — unprotected speech — for purposes of harassment. In other words, the State argues the harassment statute's "plain legitimate sweep" is to protect a victim from obscene communications intended to harass, annoy, alarm, abuse, torment, or embarrass. *See* TEX. PENAL CODE §§ 42.07(a)(1), (b)(3). Thus, because the only speech or communications prohibited by sections 42.07(a)(1) and (b)(3) are those that are obscene and intended to injure another, and obscenity is defined in subsection (b)(3) more narrowly than by the Supreme Court in *Miller v. California*, the provisions do not criminalize conduct protected by the First Amendment and are not overbroad.

To determine whether the State is correct, we must first determine the protection afforded by the free-speech guarantee of the First Amendment and then determine the meaning of the challenged statutory provision. *See Scott*, 322 S.W.3d at 668. The First Amendment, as applicable to the states through the Fourteenth Amendment, prohibits laws that abridge freedom of speech. U.S. CONST. amends. I, XIV. Article I, section 10 of the Texas Constitution provides similar protections.[3] TEX. CONST. art. I, § 10. The constitutional guarantee of free speech generally protects the free communication and receipt of ideas, opinions, and information. *Scott*, 322 S.W.3d at 668 (citing *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). However, the First Amendment has never been treated as an absolute. *Miller v. California*, 413 U.S. 15, 23 (1973); *Scott*, 322 S.W.3d at 668. As the Supreme Court recognized *United States v. Stevens*, States may proscribe certain categories of speech without violation of First Amendment protections. 559 U.S. 460, 468–69 (2010) (recognizing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct not constitutionally protected); *see Cohen v. California*, 403 U.S. 15, 20 (1971) (recognizing States are free to ban obscenity, fighting words, and intrusion into substantial privacy interests of others). Thus, "[o]therwise proscribable conduct does not become protected by the First Amendment simply because the conduct happens to involve the written or spoken word." *State v. Stubbs*, 502

[3] The only cases in which courts have held the Texas Constitution creates a higher standard have involved prior restraints in the form of court orders prohibiting or restricting speech. *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 434–35 (Tex. 1998); *see San Antonio Express-News v. Roman*, 861 S.W.2d 265, 267–68 (Tex. App.—San Antonio 1993, orig. proceeding). This is not a prior restraint case. Moreover, when neither party argues the Texas Constitution offers greater protection, we treat the state and federal free exercise guarantees as co-extensive. *State v. Valerie Saxion, Inc.*, 450 S.W.3d 602, 613 (Tex. App.—Fort Worth 2014, no pet.) (citing *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 649–50 (Tex. 2007)); *see generally Luquis v. State*, 72 S.W.3d 355, 364–65 (Tex. Crim. App. 2002) (relying on Texas Supreme Court decision when addressing matter of state constitutional law). Nuncio has not argued article I, section 8 of the Texas Constitution provides greater protection than that provided by the First Amendment of the United States Constitution. Thus, we treat the protections provided under both constitutions as co-extensive. *See Valerie Saxion, Inc.*, 450 S.W.3d at 613.

S.W.3d 218, 226 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (citing *United States v. Alvarez*, 567 U.S. 709, 717 (2012)).

Having set forth the protection provided by the First Amendment, we consider the plain meaning of the acts proscribed by sections 42.07(a)(1) and (b)(3) to determine what they encompass. *See Scott*, 322 S.W.3d at 668; *Maddison*, 518 S.W.3d at 636. Under the principles of statutory construction, we must construe a statute according to the plain meaning of its language, unless the language is ambiguous or the interpretation would lead to absurd results the legislature could not have intended. *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016); *Ex parte Zavala*, 421 S.W.3d 227, 231 (Tex. App.—San Antonio 2013, pet. ref'd). In determining the plain meaning of a statute, we read the words and phrases in context, construing them according to rules of grammar and common usage. *Zavala*, 421 S.W.3d at 231 (citing TEX. GOV'T CODE ANN. § 311.011(a)). However, words that have acquired a technical or particular meaning, whether by legislative definition or otherwise, must be construed accordingly. *Maddison*, 518 S.W.3d at 636–37 (citing TEX. GOV'T CODE § 311.011(b)).

As set out above, section 42.07(a) provides that a person commits the offense of harassment if "with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person … initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene[.]" TEX. PENAL CODE § 42.07(a)(1). "Obscene" is specifically defined as "a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function." *Id.* § 42.07(b)(3). We hold sections 42.07(a)(1) and (b)(3) are not ambiguous.

As for section 42.07(a)(1), the text first requires the actor to have the specific intent to inflict harm on the victim in the form of one of the six listed types of emotional distress. *Id.* § 42.07(a)(1); *see Scott*, 322 S.W.3d at 669. It then requires the alleged perpetrator to initiate a

communication during which he makes obscene comments or suggestions. TEX. PENAL CODE § 42.07(a)(1). Section 42.07(b)(3) defines the term "obscene," using a narrower definition than the *Miller* prohibition against the use of "patently offensive" descriptions of "sexual conduct," limiting the term "obscene" to a description of an "ultimate sex act" involving genital or anal contact, or an excretory function. *Id.* § 42.07(b)(3); *see Miller*, 413 U.S. at 24. The definition of obscenity, as recognized by the court of criminal appeals, provides "a meaning readily comprehended by the average person." *Lefevers v. State*, 20 S.W.3d 707, 712 (Tex. Crim. App. 2000). Thus, the provisions challenged by Nuncio plainly proscribes the conduct of initiating a communication and therein making specific obscene remarks with the intent to emotionally harm the person to whom the communication is made. TEX. PENAL CODE § 42.07(a)(1). Based on our construction, the proscribed conduct most certainly involves speech. The question is whether the conduct is entitled to First Amendment protection. *See Maddison*, 518 S.W.3d at 637.

As noted above, the State has authority to regulate and proscribe certain categories of speech because those categories are not protected by the First Amendment. *See Stevens*, 559 U.S. at 668–69; *Cohen*, 403 U.S. at 20. One of those categories is obscenity. *See generally Miller*, 413 U.S. at 214 (holding obscenity is not protected by the First Amendment). The challenged statutory provisions are not susceptible of application to communicative conduct that is protected by the First Amendment, i.e., they do not implicate the free-speech guarantee, because by their plain text they are directed only at persons who, with intent to emotionally harm another, make obscene remarks. *See* TEX. PENAL CODE § 42.07(a)(1), (b)(3). There is nothing in the statutory provisions to suggest they are broad enough to suppress protected speech. *See id.* Nuncio's numerous hypotheticals suggesting applications of the statute that might reach protected speech are insufficient to establish overbreadth. *See Johnson*, 475 S.W.3d at 865 (holding challenged statute must prohibit substantial amount of protected expression and danger of unconstitutional

application cannot be based on fanciful hypotheticals). Accordingly, we hold sections 42.07(a)(1) and (b)(3) are not constitutionally overbroad as they do not prohibit a substantial amount of protected speech, but merely prohibit communication of unprotected obscenities intended to harm the person to whom they are directed. A person whose conduct violates sections 42.07(a)(1) and (b)(3) is not engaging in a legitimate communication of ideas, opinions, or information, but has only the intent to inflict emotional distress for its own sake. *See Scott*, 322 S.W.3d at 670.

Vagueness

Nuncio also challenges sections 42.07(a)(1) and (b)(3) based on vagueness. He argues the provisions are unconstitutionally vague in that they fail to provide adequate notice of the prohibited conduct and encourage arbitrary and capricious prosecution. Nuncio contends, based generally on the statute's use of "another," that a person of ordinary intelligence cannot determine who is the victim, leaving law enforcement authorities with unfettered discretion to decide under what circumstances to enforce the provision. Nuncio seems to suggest the challenged provisions are so vague that prosecution is possible — and wholly within the discretion of law enforcement authorities — when the prohibited communication is overheard by random persons. Nuncio argues that due to vagueness, the statutory provisions violate his due process rights under the Fifth and Fourteenth Amendments, his right to know the nature of the accusation against him under Article 1, section 10 of the Texas Constitution, and his due course of law rights under Article 1, section 19 of the Texas Constitution. *See* U.S. CONST. amends. V, XIV; TEX. CONST. arts. I, §§ 10, 19.

A statute is unconstitutionally vague and violative of due process if it fails to provide a person of ordinary intelligence fair notice of what the statute prohibits or authorizes or encourages seriously discriminatory enforcement. *Maddison*, 518 S.W.3d at 639–40 (quoting *Ex parte Bradshaw*, 501 S.W.3d 665, 677–78 (Tex. App.—Dallas, 2016, pet. ref'd) (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)). In other words, a statute is unconstitutionally vague if

persons of common intelligence must guess at its meaning and differ about its proper application. *Maddison*, 518 S.W.3d at 639–40. All criminal laws must give fair notice about what activity is made criminal. *Bradshaw*, 501 S.W.3d at 67 (citing *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989) (en banc)). However, courts do not require that statutes be mathematically precise; rather, statutes need only provide fair warning in light of common understanding and practices. *Ex parte Paxton*, 493 S.W.3d 292, 305 (Tex. App.—Dallas 2016, pet. ref'd) (en banc). A statute is not unconstitutionally vague simply because the words or terms used are not specifically defined. *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018). Rather, words or phrases within a statute must be read in the context in which they are used. *Id.* Statutory provisions satisfy vagueness requirements if they "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* (quoting *Jordan v. De George*, 341 U.S. 223, 231–32 (1951)).

When a statute does not implicate free speech under the First Amendment, a person challenging that statute for vagueness must establish it was unduly vague as applied to his own conduct. *Wagner*, 539 S.W.3d at 314; *Scott*, 322 S.W.3d at 670–71. If First Amendment rights are implicated, the statute in question must also be sufficiently definite to avoid chilling protected speech or expression, and a challenger may complain of vagueness of the statute as it may be applied to others. *Wagner*, 539 S.W.3d at 314; *Scott*, 322 S.W.3d at 670–71. As we explained in our analysis of Nuncio's overbreadth challenge, sections 42.07(a)(1) and (b)(3) do not infringe upon any constitutionally protected speech or conduct. Accordingly, we decline to adopt the more stringent vagueness standard that would apply to a statute that "abuts upon sensitive areas of First Amendment freedoms." *Wagner*, 539 S.W.3d at 315.

Applying the plain language of sections 42.07(a)(1) and (b)(3) to this particular case, we hold the challenged provisions are not unconstitutionally vague. We conclude a person of ordinary

intelligence would recognize the provisions at issue prohibit a person from starting a communication with a person and during the course of the communication, making obscene comments, requests, or suggestions in an effort to emotionally harm the person to whom the comments, requests, or suggestions are made. The provisions are more than adequate to allow those of ordinary intelligence to recognize the term "another," as used in the statute, is a reference to the victim, that is, the person with whom the alleged perpetrator was communicating and intending to emotionally harm. Likewise, the provisions do not authorize or encourage discriminatory enforcement, but permit enforcement only when obscene comments or remarks are directed by the perpetrator to a particular victim with intent to harm. *See Maddison*, 518 S.W.3d at 639–40.

Moreover, even if the First Amendment is implicated, the statutory provisions cannot be interpreted to suggest that obscene comments made and heard in the hypothetical ether are prohibited. Rather, to sustain a prosecution, it is clear a person must engage in obscene communication with a particular person with the intent that the particular person feel harassed, annoyed, alarmed, abused, tormented, or embarrassed. Accordingly, we hold sections 42.07(a)(1) and (b)(3) are not unconstitutionally vague.

Request to Overturn Miller v. California

In 1974, the Supreme Court set out a test for obscenity in *Miller v. California*. 413 U.S. at 24. The Court held material is obscene when: (1) an average person applying contemporary community standards would find that when taken as a whole, the material appeals to the prurient interest; (2) the material describes or depicts, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) the material, when taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* Nuncio contends this standard is no longer "valid, accurate, and/or an effective test for distinguishing obscenity from protected speech"

in the Internet era and asks that we reject it in our evaluation of his challenges to the constitutionality of sections 42.07(a)(1) and (b)(3).

Since *Miller* was decided, the Texas Court of Criminal Appeals has continuously applied its test for obscenity in addressing allegations of unconstitutionality in numerous contexts. *See, e.g., Lo*, 424 S.W.3d at 21 (recognizing *Miller* defines obscenity); *Lefevers*, 20 S.W.3d at 709 (recognizing Texas Legislature drafted harassment statute "with an eye toward the constitutional definition of obscenity" as set out in *Miller*); *Davis v. State*, 658 S.W.2d 572, 578 (Tex. Crim. App. 1983) (en banc) (holding that *Miller* sets forth "the test the States of the Union must follow when they seek to regulate or control obscenity"); *West v. State*, 514 S.W.2d 433, 442 (Tex. Crim. App. 1974) (op. on reh'g) (applying *Miller* in determining constitutionality of Texas obscenity statute). As an intermediate appellate court, we are bound by pronouncements of the court of criminal appeals. *State v. Nelson*, 530 S.W.3d 186, 190 (Tex. App.—Waco 2016, no pet.) (citing *Wiley v. State*, 112 S.W.3d 173, 175 (Tex. App.—Fort Worth 2003, pet. ref'd)); *De Leon v. State*, 373 S.W.3d 644, 650 n.3 (Tex. App.—San Antonio 2012, pet. ref'd). Accordingly, we may not — as Nuncio suggests — overturn *Miller's* definition of obscenity. *See Nelson*, 530 S.W.3d at 190; *De Leon*, 373 S.W.3d at 650 n.3.

CONCLUSION

Based on the foregoing analysis, we hold sections 42.07(a)(1) and (b)(3) of the Texas Penal Code are neither unconstitutionally overbroad nor vague. We further hold we are precluded from overturning *Miller*, which has been adopted and applied by the court of criminal appeals since it was decided in 1974. Accordingly we overrule Nuncio's issues and affirm the trial court's order denying his application for writ of habeas corpus.

Beth Watkins, Justice

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TAB B

Dissent of Justice Rodriguez

Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-18-00127-CR

EX PARTE Leonardo **NUNCIO**

From the County Court at Law No. 1, Webb County, Texas
Trial Court No. 2017 CVJ 002365-C1
Honorable Hugo Martinez, Judge Presiding

Opinion by: Beth Watkins, Justice
Dissenting Opinion by: Liza A. Rodriguez, Justice

Sitting: Patricia O. Alvarez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: April 10, 2019

I agree with and join in the portion of the majority's opinion overruling Nuncio's argument that sections 42.07(a)(1) and (b)(3) of the Texas Penal Code are unconstitutionally overbroad. The statute's "plain legitimate sweep" is limited to protecting a victim from "obscene" communications intended to harass, annoy, alarm, abuse, torment, or embarrass. As articulated by the majority, obscenity is not protected speech and the statute is not overbroad in violation of the First Amendment.[1]

I respectfully disagree, however, with the majority's holding that the statute is not unconstitutionally vague. I would hold that under the current language of the statute, there are too many commonplace scenarios in which "a person of ordinary intelligence" would not have fair

[1] I agree with the majority that we are bound by the Supreme Court's definition of obscenity in *Miller v. California*, 413 U.S. 15, 24 (1973), and are precluded from overturning *Miller*.

notice of what conduct the statute prohibits until *after* an arrest is made. *See Wagner v. State*, 539 S.W.3d 298, 313 (Tex. Crim. App. 2018) (to comply with due process, a criminal statute must provide a person of ordinary intelligence with fair notice of the prohibited conduct). "A statute satisfies vagueness requirements if the statutory language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Id.* at 314 (quoting *Jordan v. De George*, 341 U.S. 223, 231-32 (1951)). Under the current statutory language, everyday conduct which is not usually considered criminal under general social norms could be criminalized without adequate notice. For example, a solicitous social communication between two people in a bar could include obscene comments or requests intended to embarrass or harass the other, or heated arguments between significant others could include obscene comments intended to annoy, torment, or embarrass the other. Both examples constitute conduct that could be considered criminal under section 42.07(a)(1) as drafted. As in *Long v. State*, where the court held that the "stalking" provision of the 1993 harassment statute was unconstitutionally vague on its face, the current statute continues to suffer from the same issues of impermissible vagueness. *See Long v. State*, 931 S.W.2d 285, 297 (Tex. Crim. App. 1996).

In addition, as argued by Nuncio, section 42.07(a)(1) fails to clearly identify the victim of the intended harassment. Unlike subsections (a)(2) and (a)(3), which identify the harassment victim as "the person receiving" the threat or the false report, subsection (a)(1) does not specify who is the victim of the intended harassment by obscenity. *Cf.* TEX. PENAL CODE ANN. § 42.07(a)(1) with *id.* § 42.07 (a)(2), (a)(3). Thus, the reach of subsection (a)(1) is not limited to "the person receiving" an obscene communication made with intent to harass the recipient, but could be extended to a situation in which the defendant makes an obscene comment to one person but his intent is to harass a different person, i.e., "another." Such vagueness gives law enforcement

too much discretion with respect to enforcement of the statute and thus violates due process. *See Wagner*, 539 S.W.3d at 313.

In order to satisfy due process, section 42.07(a)(1) needs more specificity to place a "person of ordinary intelligence" on fair notice of what conduct could be construed as a violation of the statute. I would therefore hold that the harassment by obscenity statute is unconstitutionally vague in all of its applications, *i.e.*, on its face. *See id.* at 314 ("In the context of a challenge to a statute that does not regulate protected speech, a court should uphold a vagueness challenge only if the statute is impermissibly vague in all of its applications."). Accordingly, I would grant Nuncio's pretrial application for writ of habeas corpus because the statute under which he was charged is void for vagueness. *See Ex parte Zavala*, 421 S.W.3d 227, 231 (Tex. App.—San Antonio 2013, pet. ref'd).

For these reasons, I respectfully dissent.

Liza A. Rodriguez, Justice

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TAB C

Grant of Discretionary Review

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

8/21/2019 **COA No. 04-18-00127-CR**
NUNCIO, EX PARTE LEONARDO Tr. Ct. No. 2017 CVJ 002365-C1 PD-0478-19

On this day, the Appellant's petition for discretionary review has been granted. The original and ten copies of the appellant's brief must be filed with this Court within 30 days. The State's brief is due 30 days after the timely filing of the appellant's brief. GRANTED ON GROUND NO. 1, 2, 3 & 4; ORAL ARGUMENT WILL NOT BE PERMITTED

Deana Williamson, Clerk

DISTRICT CLERK WEBB COUNTY
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Case # PD-0478-19

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Case Number	PD-0478-19
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Assigned to Judge	
Attorney	Mark Bennett
Firm Name	Bennett & Bennett
Filed By	Mark Bennett
Filer Type	Not Applicable
Fees	
Convenience Fee	$0.00
Total Court Case Fees	$0.00
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Total Court Filing Fees	$0.00
Total Court Service Fees	$0.00
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Total Provider Service Fees	$0.00
Total Provider Tax Fees	$0.00
Total Taxes (for non-court fees)	$0.00
Grand Total	$0.00
Payment	
Account Name	Chase Mastercard
Transaction Amount	$0.00
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